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No. 88-470

In The

Supreme Court of the United States

October Term, 1988

JONATHAN MELIN, SR., AND DIANA MELIN,
Petitioners,

v.

STATE OF NORTH DAKOTA,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

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QUESTIONS PRESENTED

May the State appeal from an order dismissing a criminal complaint even though the order is fashioned a judgment of not guilty?

Does North Dakota's compulsory attendance law unconstitutionally infringe upon petitioners' free exercise of religion?

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STATEMENT OF THE CASE

Jonathan Melin, Sr., and Diana Melin are the parents of Jonathan Melin, Jr. ("Teddy"), who was born May 9, 1979. The family resides in Oakes, Dickey County, North Dakota. North Dakota law provides that parents who have control over an educable child between the ages of 6 and 16 years must send that child to an approved public, private, or home school. Before a school may be approved, the teachers therein must have a state certificate evidencing the fact that they have earned a bachelor's degree, have taken classes in a program of general education, and have completed a student teaching experience. Jonathan and Diana Melin held bachelor's degrees but did not apply for nor receive teacher certificates. They refused to send Teddy to an approved home school, parochial school, or public school.

On October 2, 1986, Mr. and Mrs. Melin were charged with violating North Dakota's compulsory attendance law. On the day before trial, a stipulation was entered into by the Melins and the State of North Dakota. In the stipulation, the defendants admitted violating the compulsory attendance law as alleged in the criminal complaint.

On July 8, 1987, Dickey County Judge Gary D. Neuharth heard testimony proffered by the Melins directed at the constitutionality of the compulsory attendance laws of North Dakota.

At the hearing, Jonathan Melin, Sr., testified he chose to teach Teddy at home for three reasons, two of them secular in nature. He alleged that, first, home education is

superior to education in schools; secondly, home education serves to protect Teddy from peer dependency; and thirdly, his religion requires him to assume the responsibility for training Teddy in God's ways. Diana Melin concurred with these reasons and both she and Jonathan Melin, Sr., testified that their firmly held religious conviction was acquired in 1985. Jonathan Melin, Sr., further testified that he had no religiously based objection to teacher certification but objected to it because of the inconvenience it would cause him to obtain it.

On September 3, 1987, County Judge Neuharth issued his Memorandum Opinion in which he dismissed the criminal complaint. Judge Neuharth concluded that North Dakota's requirement of teacher certification unconstitutionally infringed upon the Melins' right to free exercise of religion under the first amendment to the United States Constitution. Sometime thereafter, Judge Neuharth issued a Judgment backdated to September 3, 1987, in which he found defendants not guilty.

On appeal, the North Dakota Supreme Court determined Judge Neuharth's actions did not constitute an acquittal but rather a dismissal of the criminal complaint. North Dakota's highest court concluded County Judge Neuharth erred when he made the legal conclusion that teacher certification violated the Melins' first amendment rights. The case was remanded to the trial court for a determination of guilt or innocence. If found guilty, the Melins risk having imposed upon them a fine of up to $500, the maximum penalty for an infraction under North Dakota law.

SUMMARY OF ARGUMENT

The county judge did not acquit the Melins but rather, dismissed the complaint against them. Because the county judge did not resolve in the Melins' favor any factual element of the offense charged, appeal by the State did not violate the double jeopardy clause.

The State of North Dakota has a compelling interest in assuring quality education for its citizens. This has been accomplished by laws which only minimally affect the Melins' right to freely exercise their religion. These laws are less intrusive than those of other states. On balance, North Dakota's compulsory attendance laws do not unconstitutionally infringe upon the Melins' free exercise rights.

The Melins' Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THE STATE OF NORTH DAKOTA DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE BY APPEALING THE COUNTY JUDGE'S DECISION.

Ordinarily, the prosecution is barred from appealing a judgment of acquittal by the fifth amendment to the United States Constitution which provides in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," U.S. Const. amend. V.

Contrary to the assertion of the Melins, the double jeopardy clause is inapplicable to the facts of this case because there never was an acquittal.

Dickey County Judge Neuharth issued a decision dismissing the complaint and followed that by a Judgment wherein he determined the defendants were not guilty.

The North Dakota Supreme Court correctly concluded that the latter decision by Judge Neuharth was not an acquittal in the legal sense of the word. As this Court has stated:

> What constitutes an "acquittal" is not to be controlled by the form of the judge's action. (Citations omitted.) Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

The double jeopardy clause establishes the fundamental right to keep the decision of the finder of fact only if that decision resolves in the accused's favor a factual element of the offense. *United States v. Scott*, 437 U.S. 82 (1978).

In North Dakota, "element of an offense" has been defined in statute:

> **12.1-01-03. Proof and presumptions.**
>
> . . . .
>
> "Element of an offense" means:
>
> a. the forbidden conduct;

b. the attendant circumstances specified in the definition and grading of the offense;

c. the required culpability;

d. any required result; and

e. the nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue.

The "forbidden conduct" (*see* N.D.C.C. § 12.1-01-03(a)) in this case is set forth in N.D.C.C. § 15-34.1-01 which states:

> **15-34.1-01. Compulsory attendance.** Every parent, guardian, or other person who resides within any school district, or who resides upon any government base or installation without any school district, and has control over any educable child of an age of seven years to sixteen years who does not fall under the provisions of sections 15-34.1-02 or 15-34.1-03, shall send or take such child to a public school each year during the entire time such school is in session.

In order to prove the offense charged in the criminal complaint against the Melins, the State of North Dakota had the burden of demonstrating:

1. That the Melins had control over an educable child of an age of 7 to 16 years;

2. That the Melins resided within Oakes Public School District No. 41; and

3. That the Melins failed to send said child to a public school during the entire time such school was in session.

These elements were conclusively proved by way of the stipulation signed by the Melins, their attorney, and

the Dickey County prosecutor. The stipulation stated, in part:

> 1. The defendants, Jonathan Melin, Sr., and Diana Melin, admit that they reside within the exterior boundaries of Oakes Public School District No. 41 and that during the 1986-87 school year they violated Section 15-34.1-01, N.D.C.C., with regards (sic) to their son, Jonathan Melin, Jr.

The stipulation was filed with the court and read into the record before any further testimony at the hearing was taken.

None of the foregoing elements of the offense were resolved in favor of the Melins by Judge Neuharth. Indeed, the county judge did not so much as discuss any of these elements of the offense in his Memorandum Opinion.

The Melins now argue the State failed to prove the nonexistence of a defense, namely their free exercise of religion claim. However, it is clear from legislative history that the defenses referred to by N.D.C.C. 12.1-01-03(1) are only those denominated in N.D.C.C. ch. 12.1-05. N.D.C.C. 12.1-01-03(1) is derived from the proposed Federal Criminal Code. *State v. Trieb*, 315 N.W.2d 649, 657 n.9 (N.D. 1982). The free exercise of religion claim made by the Melins is not a "defense" which has any statutory basis in N.D.C.C. ch. 12.1-05 or anywhere else in the North Dakota Century Code.

Implicit in the Melins' argument is the supposition that a jury can or should decide whether or not their free exercise of religion claim is valid.

In *Dennis v. United States*, 341 U.S. 494 (1951), Dennis appealed his conviction for violating the Smith Act arguing, *inter alia*, the trial court erred in failing to submit to the jury whether or not his conduct created a clear and present danger that it would bring about the substantive evils Congress had a right to prevent.

> The argument that the action of the trial court is erroneous, in declaring as a matter of law that such violation shows sufficient danger to justify the punishment despite the First Amendment, rested on the theory that a jury must decide a question of the application of the First Amendment. We do not agree.
>
> When facts are found that establish the violation of statute, the protection against conviction afforded by the First Amendment is *a matter of law*.

Id. at 513 (emphasis supplied).

In North Dakota, all questions of law are to be decided by the court, not by juries. N.D.C.C. §§ 29-21-03 and 29-21-04.

There are several policy reasons why such issues of law should not be decided by juries and chief among them is the complexity of the analyses involved in first amendment cases.

This is not to say that defendants cannot raise a free exercise of religion claim in the context of a criminal prosecution. Defendants could do so by motion pursuant to N.D. Crim. P. 12(b).

The decision of a trial court judge to dismiss the complaint based upon a free exercise of religion claim is reviewable by an appellate court pursuant to N.D.C.C.

§ 29-28-07(1). *State v. Hanson*, 252 N.W.2d 872 (N.D. 1977); *State v. Howe*, 247 N.W.2d 647 (N.D. 1976).

Since the free exercise of religion claim is a matter of law to be decided by a court, it follows that the State of North Dakota was not required to prove beyond a reasonable doubt the nonexistence of this so-called defense to the finder of fact. Thus, the "constitutional affirmative defense" as the Melins prefer to call it is not an element of the offense with which the Melins were charged.

There was no finding made by the county judge which resolved in the Melins' favor some or all of the factual elements of the offense charged. These realities cannot be changed by the form in which the county judge cast his order and the appeal by the State of North Dakota did not violate the double jeopardy clause of the fifth amendment.

Moreover, several of the major underlying policy reasons for application of the double jeopardy clause do not apply to this case.

These policy reasons were succinctly set forth by Justice Black in *Green v. United States*, 355 U.S. 184 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-188.

Upon remand to the county judge there will be no need for further proceedings devoted to resolution of factual issues going to the elements of the offense charged. *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). Those factual issues have long since been resolved by the stipulation which was presented to the county judge. The embarrassment and ordeal associated with a new trial are therefore absent. There will be no continuing state of anxiety and insecurity based upon the possibility that even though innocent, the Melins may be found guilty. They have admitted their violation of the statute.

For the foregoing reasons, the appeal by the State of North Dakota of Judge Neuharth's decision did not violate the double jeopardy clause of the fifth amendment.

II. NORTH DAKOTA'S COMPULSORY ATTENDANCE LAWS, AS APPLIED TO THE MELINS, ARE NOT UNCONSTITUTIONAL.

The first amendment to the United States Constitution preserves to the individual the right to free exercise of religion. The right of belief is absolute, but the right of conduct based upon that belief is not, and can be regulated by the state. *Sherbert v. Verner*, 374 U.S. 398 (1963).

In considering a free exercise claim, it is appropriate to use the three-pronged analysis set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The first prong in this analysis involves proof by the Melins that the State has burdened a sincerely held religious belief which is central to their religion. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988). The burden then shifts to the State to show that it has a compelling interest which outweighs the Melins' interest in the free exercise of their

religion. The third prong involves a showing by the State that the means by which the compelling State interest is achieved is the least restrictive means available. *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707 (1980).

A. The Melins Failed to Show the State Burdened a Sincerely Held Religious Belief Central to Their Religion.

The Melins' desire to teach their son at home was motivated only in part by a religious belief. Jonathan Melin, Sr., testified that he chose to teach his son at home for three reasons, two of them secular in nature. He believed home education to be superior to education received in schools and he sought to protect his son from peer dependency by educating him at home. His third reason for choosing to educate his son at home was based upon his religious belief that he was required to assume the responsibility for training his son in God's ways. Both Jonathan and Diana Melin testified that they acquired this religious conviction in 1985. The Melins' recent conversion bears no resemblance to the 300 years of consistent religious practice of the Amish discussed in *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

Although the Melins refer to themselves as Christians, Jonathan Melin acknowledged that not all Christians are required by their faith to train their children in their own home. Since the vast majority of all Christians in this country do not educate their children at home and since the Melins have failed to show how their religion differs from that of other Christians, it is difficult to see

how their objection to teacher certification is central to their religion.

The Melins' religious convictions, even if sincerely held, are unlike those of the Amish considered in *Yoder*. The Old Order Amish religion pervaded and determined virtually the entire way of life of the Amish. Their religious beliefs dictated separation from "worldly" influences and this lifestyle had been followed for centuries. *Id.* at 217.

Contrast these beliefs with those recently acquired by the Melins, beliefs which are not shared by any organized group.

The burden upon the Melins' religious beliefs is slight. Both of the Melins are college educated and admitted they have no objection to teacher certification per se. Jonathan Melin, Sr., admitted that if he were qualified to be a certified teacher, he would seek certification immediately. The Melins' objection to certification lies solely in the inconvenience it would cause them to obtain it. Since the Melins already hold bachelor's degrees, it would be necessary only that they take courses in pedagogy and complete a student teaching experience.

At most, the burden upon the Melins' religious conviction is indirect. "In our view, the [teacher] certification requirement can only be viewed as a direct restraint on plaintiffs' free exercise rights if the contention is accepted that all secular regulation of private religious schools violates the first amendment, a conclusion which is unsupported by any previous precedent." *Sheridan Road Baptist v. Department of Education*, 396 N.W.2d 373, 387

n.13 (Mich. 1986), *cert. denied*, 107 S. Ct. 2183 (1987) (Boyle, J., concurring).

The burden upon the Melins is clearly distinguishable from the burden on the Amish in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Testimony in *Yoder*, cited by this Court, was given that compulsory high school attendance could not only result in great psychological harm to Amish children, but would also ultimately result in the very destruction of the Amish church community. *Id.* at 212. Analogous testimony in this case was notably absent.

However, even an indirect burden upon one's religious beliefs may make a statute constitutionally infirm unless the statute meets a compelling state interest. *Braunfeld v. Brown*, 366 U.S. 599 (1961).

B. North Dakota has a Compelling State Interest in the Education of its Citizens.

In *Brown v. Topeka Board of Education*, 347 U.S. 483 (1954), the Supreme Court emphasized the magnitude of the states' interest in the education of its citizens:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be

> expected to succeed in life if he is denied the opportunity of an education.

Id. at 493.

In *Board of Education v. Allen*, 392 U.S. 236 (1968), the Supreme Court confirmed the power of states to insist that children receive a minimum number of hours of instruction, from teachers with specified training, covering prescribed subjects of instruction. "Indeed, the state's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters* (citation omitted): 'If the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.' " *Id.* at 246-47.

It is clear that the State of North Dakota has a compelling state interest in assuring that its citizens are adequately educated. The Melins do not contend otherwise.

C. Teacher Certification is the Least Restrictive Means Now Available to Assure Quality Education of North Dakota's Children.

In North Dakota, the Superintendent of Public Instruction is given the authority and has the duty to determine the criteria for teacher certification based upon considerations of character, adequate educational preparation, and general fitness to teach in the public schools of this state. N.D.C.C. § 15-36-01. The requirements for certification of teachers in North Dakota involve gaining expertise in a particular substantive field, taking classes

in a program of general education, and student teaching. *See* N.D. Admin. Code § 67-02-02-02. These requirements are clearly aimed at and closely related to the goal of producing competent teachers. To the extent that teacher certification furthers education, it serves to satisfy the state's compelling interest. *Sheridan Road Baptist v. Department of Education*, 396 N.W.2d 373, 381 (Mich. 1986), *cert. denied*, 107 S. Ct. 2183 (1987).

It is admitted that a teaching certificate does not guarantee that the holder is a competent teacher. However, a certificate does guarantee that the holder has been exposed to the knowledge that a competent teacher should have. *State v. Patzer*, 382 N.W.2d 631, 639 (N.D.), *cert. denied*, 107 S. Ct. 99 (1986).

The Melins argue that a less restrictive alternative to teacher certification exists but they do not specify just what that alternative is. They argue that compulsory attendance laws in other states do not uniformly require teacher certification for all home schooling parents. However, they gloss over the fact that many of those statutes require "equivalent instruction" or "comparable instruction" as determined by local educational bodies. Many of these statutes have been challenged as unconstitutionally void for vagueness. *Jeffery v. O'Donnell*, ___ F. Supp. ___ (M.D. Pa. 1988); *Ellis v. O'Hara*, 612 F. Supp. 379 (D. Mo. 1985); *Bangor Baptist Church v. State of Maine*, 549 F. Supp. 1208 (D. Me. 1982).

Having local or state officials make subjective evaluations of parents' ability or lack of ability to teach their own children is arguably a more restrictive and intrusive

method of gauging the qualifications of parents as educators than North Dakota's teacher certification requirement. *State v. Patzer*, 382 N.W.2d 631, 638-39 (N.D.), *cert. denied*, 107 S. Ct. 99 (1986).

Even if North Dakota's compulsory attendance law is more restrictive than the laws of other states, it does not follow that the law is constitutionally infirm. To follow the Melins' rationale, if North Dakota's law were struck down because it is more restrictive than the law of other states, then another state would suddenly become the state with the most restrictive law and then that law, too, would be unconstitutional. In turn, each state's law would be struck down. Extended to its logical conclusion, this argument would invalidate any law which attempted to regulate the conduct of citizens who claimed the statute violated their freedom to exercise their religion. We are well advised to heed the admonition of Justice Blackmun to avoid that "slippery slope" which the Melins invite us to climb. "And, for me, 'least drastic means' is a slippery slope and also the signal of the result the court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 189 (1979) (Blackmun, J., concurring).

Teaching does not come naturally to a person any more than practicing medicine or law. Preparation to teach is crucial. "Courses in child psychology, how children learn, various methods of conveying information and developing the learning process and a knowledge of

the subject matter will prepare a person to be a better teacher . . . . This kind of knowledge is essential if one is to become a good teacher." *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 493 (8th Cir. 1987).

The Melins are indisposed to acquire the tools necessary to practice their home schooling craft, not for religious reasons, but because it would be inconvenient for them to do so. The Melins are equally indisposed to procure the services of one who possesses the necessary qualifications. Balancing the centrality of Melins' religious beliefs, which are only slightly and indirectly burdened by the teacher certification requirement, against North Dakota's compelling interest in certification as a means of insuring quality education for its children, the balance clearly favors the state.

CONCLUSION

The appeal by the State of North Dakota of a county judge's dismissal of a criminal complaint did not violate the double jeopardy clause of the fifth amendment. North Dakota's compulsory attendance law, as applied to the Melins, was constitutional. For these reasons, this Court should deny the Melins' petition for writ of certiorari.

Dated this 14 day of October, 1988.

Respectfully submitted,

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